Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

BRENDA BOYNTON, PETITIONER

v.

WESTERN WYOMING COMMUNITY COLLEGE,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a Title VII Civil Rights retaliation case, where motive and intent are at issue, should a Motion for Summary Judgment against the plaintiff be considered under heightened scrutiny?

2. In a Title VII Civil Rights retaliation case, where motive and intent are in issue, is a plaintiff's Seventh Amendment right to a jury trial infringed where, under the "Celotex Trilogy", summary judgment is granted based upon discrete facts rather than upon the totality of the circumstances?

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is not reported and appears in the Appendix at p. 1a, infra.

The Opinion of the United States District Court for the District of Wyoming is also unreported and appears in the Appendix at p. 12a, infra.

JURISDICTION

The Opinion, Order and Judgment of the Tenth Circuit Court of Appeals was entered on the 29th day of November, 2005. Petition for Rehearing was denied on January 6, 2006. An Order Granting Extension of Time to File a Petition for Writ of Certiorari was granted on February 14, 2006, extending the time to file a Petition for Certiorari to June 5, 2006.

This Petition is being docketed in this Court within the time period allowed by the Order of this Court. The jurisdiction of this court is invoked pursuant to 28 USC §1254. The basis for federal jurisdiction in the first instance was 28 USC §1331, a civil action arising under the Constitution laws, on treaties of the United States, and 28 USC §1343(a)(3), a civil action to redress the deprivation, under color of state law, statute, ordinance, custom or usage of any right, privilege or immunity secured by the Constitution of the United States.

RELEVANT PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution, in pertinent part, provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved....

Federal law at 42 USC §2000e-3(a), in pertinent part, provides:

> Other unlawful employment practices.
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this subchapter.

Federal law, at 42 USC §1981a(c)(l), provides:

> If a complaining party seeks compensatory or punitive damages under this section--
>
> (1) any party may demand a trial by jury.

Rule 56(b) of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

Rule 56(c) of the Federal Rules of Civil Procedure provides in pertinent part, as follows:

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT

This is a Title VII retaliation case under Section 704 of the Civil Rights Act of 1964, as amended, (42 USC §2000e-3). The petitioner alleged that she was terminated as a result of her good faith opposition to hostile environment sex discrimination. The District Court granted Summary Judgment based upon petitioner's purported failure to show evidence of causal connection between protected activity and adverse employment action. (Appendix, pages 11a through 27a.) See Clark County School District v. Breeden, 532 U.S. 268 (2001). On appeal to the Tenth Circuit Court of Appeals, a panel affirmed. (Appendix pages 1a through 12a.)

The petitioner seeks a Writ of Certiorari to review the applicability of the "Celotex Trilogy" (infra) to Title VII claims under the burden shifting framework of McDonnell-Douglas v. Green, 411 U.S. 792 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). This court's review of the 1972 McDonnell-Douglas evidentiary paradigm is necessary in light of heavier burdens placed on nonmovants in summary judgment proceedings by the 1986 "Celotex Trilogy" (infra) and Congressional action to allow trial by jury in

discrimination cases in the 1991 Amendments to the Civil Rights Act of 1964, (42 USC §1981a). These developments in the law of civil rights have given rise to conflicts among the circuits regarding the kind and amount of evidence necessary to be shown to survive a motion for summary judgment. Compare Chapman v. AI Transport, 229 F.3d 1012, 1026 (11th Cir. 2000), ("The long and short of it is that summary judgment rule applies in job discrimination cases just as in other cases. No thumb is to be placed on either side of the sale."); with Wallace v. DTG Operations, Inc., 442 F.3d 1112, ___ (8th Cir. 2006), ("[A]lthough Rule 56 contains only one standard, we must exercise particular caution when examining the factual question of intent to ensure that we dutifully extend all justifiable inferences in favor of the nonmoving party.")[1]

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[1]Other Circuits have used different language when describing the care that must be given to summary judgment motions in Title VII actions. Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 54 (1st Cir. 2000), ("Courts should exercise particular caution before granting summary judgment for employers on such issues as pretext, motive, and intent."); Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 87 (2nd Cir. 1996), ([T]rial courts must be especially cautious in handing out summary judgment in discriminary cases...."); Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 958-59 (4th Cir. 1996) ("Courts must take special care."); Perry v. McGinnis, 209 F.3d 597, 600 (6th Cir. 2000), ("Summary judgment is generally not well suited for cases in which motive and intent are at issue and in which one party is in control of the proof."); McCoy v. WGH Continental Broadcasting Co., 957 F.2d 368, 370-371 (7th Cir. 1992) (Summary Judgment standard of review"...is applied with added rigor in employment discrimination cases:; Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104, 1111 (9th Cir. 1991) ("We require very little evidence to survive summary judgment...."); Randle v. City of Aurora, 69 F.3d 441, 443 (10th Cir. 1995) (Judgments about intent are best left for trial and are within the province of the jury."); Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1086 (11th Cir. 2004), ("Summary judgment rule applies in job discrimination cases as in other cases. No thumb is to be placed on

Factual Background

Brenda Boynton was a full-time custodian at Western Wyoming Community College in Sweetwater County, Wyoming, from December 1, 1997, until her termination in February, 2003, a period of nearly six (6) years. During the initial few years of her employment, Miss Boynton, while working at the College's Rock Springs Campus, received several job performance evaluations from her supervisor which demonstrate that she was a good performer:

> "This supervisor has received quite a few compliments on this employee"
>
> "Brenda spends her time very productively"
>
> "She is able to communicate with her fellow employees about work and how she may improve it"
>
> "This employee is a very dependable young lady and works overtime when offered"
>
> (Aplt. App. pp. 99-106.)

However, while working at the Rock Springs Campus, her male supervisor engaged in some rather bizarre and offensive conduct. In her affidavit, responding to the defendant's Motion for Summary Judgment, she explained:

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either side of the scale.")

"However, during my employment, Gary Bussart behaved in a way which was offensive to me. Specifically, on one occasion Mr. Bussart entered the ladies room at the College while I was using it and, while I was still in the stall, asked me why I was using the men's room. I told him that I was not using the men's room, that this was the ladies room and asked him to leave. He refused to do so. I finished using the toilet and left the ladies room. At that time, I talked about the incident with a co-employee, Tana Sheppard, and was advised by her that such had happened previously.

"On another occasion, Mr. Bussart came into the men's room while I was clearly cleaning it and proceeded to use the urinal in my presence. I verbally objected to such and left the men's room and contacted Rich Mathews, Gary Bussart's supervisor, and complained. Rich Mathews simply said, "That's Gary!" and left it at that."

(Aplt. App. pp. 20-21.)

In 1998, Miss Boynton was transferred to the Green River Campus of the College, (in the nearby Town of Green River, Wyoming), and came under the joint supervision of her original supervisor and the Green River Facility Manager, Mrs. Huebner. However, Miss Boynton's job performance reviews continued to be quite "satisfactory":

"Brenda is a reliable employee who conscientiously fulfills her job description."

"Brenda fulfills her job description to the fullest."

"Fulfills the job description."

After the transfer to the Green River Center, however, Miss Boynton became pregnant. For some reason, her male supervisor took offense and acted with hostility toward petitioner. Miss Boynton, in her affidavit, described his behavior, her subsequent complaint to the College President and the College's response:

> "After being transferred to the Green River Center, I became pregnant and notified Mr. Bussart of such. Mr. Bussart took offense to my pregnancy and said, "How dare you do this to me?," in a manner I felt was inappropriate. Thereafter, he continually told me that he didn't think single, pregnant women should work for him, and requested, on several occasions, that I provide to him a specific date for the birth of my child, and insisted that I take maternity leave prior to my child's birth. During this period of time, Mr. Bussart disturbingly seemed to "hover" over me and follow me around while I performed my duties. All of these activities served to make my work at WWCC unpleasant and hostile toward me as a woman.
>
> "**On September, 25, 2000**, and prior to my return from maternity leave, I arranged to have a meeting with the President of the College, Dr. Tex Boggs. At this meeting, I expressed to Dr. Boggs my displeasure with Mr. Bussart's behavior toward me, regarding so-called "restroom incidents," and his related hostile attitude toward me as a woman, my pregnancy, and other matters.

I did this to try to rectify the situation before I returned to work. At these meetings, I was advised that the College would conduct an investigation and report back to me.

"**On the 9th day of October, 2000**, I received the attached letter from Mr. Marty Kelsey, the Assistant to the President of the College, indicating that they had spoken with various persons, including Mr. Bussart and Mary Ann Huebner, and explained to them my complaints about Mr. Bussart. (Exhibit F.) The letter indicates that Mr. Bussart denied the accusations and that Mrs. Huebner was informed of my complaints about him, but could not confirm them. The letter indicated that nothing further would be done by the College because the allegations were denied and no evidence existed to confirm them.

"However, I have since learned from the testimony of Dean Marty Kelsey and Dr. Tex Boggs that both had knowledge of other incidents in which Mr. Bussart had invaded the "bathroom privacy" of other women employees, specifically Tana Sheppard, Donna Poulos and Jean Gibbons. Also, Mr. Bussart, in his deposition, admitted to the prior incidents, but denied the incidents I reported."

On October 10, 2000, the day immediately following the October 9, 2000, no-cause letter, a continuous and sequential succession of retaliatory conduct was commenced by her supervisor that lasted roughly two years and culminated in Brenda Boynton's termination in February, 2003. The day after Miss

Boynton was advised by the College that her allegations about Bussart's conduct would go nowhere, Miss Boynton was given a "marginal" job performance review by her supervisor--her first low evaluation in more than three years of employment. Gary Bussart, Brenda Boynton's direct supervisor, and Mary Ann Huebner, the facility manager, rated Brenda Boynton as "marginal" in the area of "Job Related Communication Skills" with the following "Comment":

> Brenda attends the staff meetings as requested. **When Brenda encounters problems or has questions regarding her work, she should first ask the onsite supervisor/direct supervisor.**" (Emphasis supplied.)

On the general comments section of the evaluation of October 10, 2000, given the day after the College acquitted Mr. Bussart of the Boynton allegations, Gary Bussart **and** Mary Ann Huebner said:

> Brenda has been dependable in coming to work on time. **Brenda needs to realize she is part of the GRC team and it would be beneficial to her to work together with the other staff people.** (Emphasis supplied.)

In addition to receiving the marginal evaluation from Huebner/Bussart, after returning from maternity leave and meeting with Dr. Boggs, Mr. Bussart began to criticize her work at every turn, though there were no formal "write-ups" for a few months. In February, 2001, however, Mr. Bussart, over Miss Boynton's verbal objection, again invaded her privacy by bursting into her

locked break room while she was manually pumping her breasts for milk for her baby, watched while she covered up, and then insisted that he had a right to be in the break room, even when locked. Complaint to Mrs. Huebner resulted in reprimand and direction that breast pumping be done in the ladies room. (Aplt. App. pp. 23-24.) This incident was soon followed by a "special" Job Performance Evaluation, covering October 10, 2000, through March 12, 2001, in which Miss Boynton was judged "UNSATISFACTORY" in the areas of "Quality of Work," "Productivity and/or Efficient Time Use," and "Job Related Communication Skills," while her "Job Knowledge" was deemed merely "MARGINAL".

Following the "unsatisfactory" evaluation of March, 2001, Miss Boynton was put on the first of three consecutive "Remediation Plans," by her supervisors. In general, these "Plans," prepared jointly by Bussart and Huebner and reviewed by Mr. Kelsey, (who had cleared Bussart despite knowing his record), required Miss Boynton to keep a detailed daily written log of her job activities in ten-minute increments. In addition, she was to e-mail a daily report to Huebner/Bussart in which she was to report three "unusual events" that occurred during her shift.

In June, 2001, yet a third consecutive critical Job Performance Evaluation was prepared by Bussart and Huebner in which Miss Boynton was again rated to be an exceedingly poor employee and which recommended to Dr. Boggs her immediate termination as an employee. Dr. Boggs, being concerned that the Remediation Plan might constitute "retaliation," declined to immediately terminate Miss Boynton; but, instead, authorized a second and then a third Remediation Plan to be administered

solely by Mary Ann Huebner.

Finally, in the Spring of 2002, Ms. Huebner sent a memo to her staff imploring them to evaluate Brenda Boynton on her performance; suggesting that if her performance was "unsatisfactory" that specific examples be recalled, "including number of times the incident has occurred," and "seeking any documentation you may have, such as e-mails or anything else."

A Notice of Proposed Termination for cause followed wherein the College alleged that Miss Boynton should be terminated based upon several, but minor and arguably pretextual problems caused by faulty equipment, failure to train and conflicting directives. For instance, Miss Boynton was criticized for not properly operating a "sander" used to sand a steep hill on snowy days; the sander, however, proved to be inoperable when the sand was "frozen" into chunks and could not be spread which typical occurred on snowy days. Miss Boynton allegedly could not efficiently use the "snow plow" because a co-worker failed to instruct her on using a "cheater bar" to attach the blade. She was criticized for her supervision of unruly grade school ballet students despite the presence of the ballet teacher; and for not turning off a fire alarm before she determined there was no fire. She was criticized for not cleaning "mouse droppings" from Ms. Huebner's uncleared desk; while Mr. Bussart had specifically directed her not to clean desks that have not been cleared. Finally, she was blamed for not timely cleaning-up a few dead "miller moths" that infest Wyoming every Spring and early Summer.

Based upon these late reported and trivial complaints, and after nearly eighteen months of

"remediation plans", the College began termination proceedings against Ms. Boynton. The College's Board of Trustees convened a hearing to consider the proposed termination, but none of the Board members attended the hearing. At the hearing, evidence was admitted showing that the President of the College knew that the petitioner's supervisor had a history of harassing women in the ladies room; that the supervisor issued a marginal job performance evaluation the day after the College found no cause for petitioner's complaint; that three consecutive remediation plans were then imposed; that the College President had concern that the supervisor's termination recommendation was motivated by "retaliation"; that petitioner's performance was next to exemplary prior to her complaint; and that adverse employment action was taken **one day** after the College issued its no-cause decision on her complaint.

The Board, after purportedly reviewing the transcript of the hearing, nevertheless voted to terminate petitioner's employment.

Disposition Below

Exhausting required administrative remedies, petitioner filed suit in the United States District Court for the District of Wyoming alleging unlawful retaliation pursuant to Section 704 of Title VII of the Civil Rights Act of 1964, 78 STAT. 257, as amended, and codified at 42 USC §2000e-3(a). After discovery, the respondent College submitted a motion for summary judgment pursuant to Rule 56(c) F.R.Civ.P. in which the College offered evidence that the building supervisor, who ultimately recommended termination, purportedly did not know about petitioner's protected activity. Therefore,

the College argued, summary judgment should be granted since there was no evidence of causal connection between the protected activity and the adverse employment action of termination, and the defendant had cause for discharge.

Petitioner responded to the respondent's motion by submitting her detailed affidavit specifically showing the hostile environment created by her supervisor, her complaint about such to the College President, and the adverse action, which began one day after the College closed down its investigation, which continued for the better part of two years in the form of repeated and onerous "remediation plans", culminating with termination based upon pretextual reasons.

Citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the United States District Court granted the respondent's Summary Judgment Motion on the eve of trial. The Court assumed that the plaintiff had shown protected opposition and adverse employment action, but held that she had not shown a causal connection between them. Relying upon Peterson v. Utah Dept. of Corrections, 301 F.3d 1182, 1188 (10th Cir. 2002), and Luckie v. Ameritech Corp., 389 F.2d 708, (7th Cir. 2004), the Court found that because there was evidence that the building supervisor did not know of the plaintiff's protected activity when she recommended termination, she did not have the retaliatory motive to link the protected activity to the adverse action; therefore, the court ruled the College itself did not know of the protected activity. This, of course, ignored other copious and undisputed evidence that the College President, the Dean of Administration, the petitioner's supervisor and, eventually, the seven-member Board of Trustees, knew

that she had engaged in protected activity immediately before her supervisor commenced giving her poor evaluations, imposed repeated and continuous sequence of onerous remediation plans, and recommended termination; and that by turning the administration of a continued and already tainted and retaliatory remediation plan over to someone without knowledge, merely made that person the cats paw of the person with *animus*. See e.g. Stimpson v. Tuscaloosa, 186 F.3d 1328, 1332 (11th Cir. 1999); Haas v. Advosys., Inc., 168 F.3d 732 (5th Cir. 1999).

On appeal, a panel of the Tenth Circuit Court of Appeals affirmed the lower court in an unpublished opinion which, for the most part, simply adopted the District Court's decision, (and the appellee's statement of facts), without elaboration. (Appendix, p. 9a.) The Tenth Circuit described its "Standard of Review" in summary judgment cases by reference to its' decision in Garrison v. Gambro, 428 F.3d 933, 935 (10th Cir. 2005), which sets forth the now familiar standards of review articulated by this Court in the "Celotex Trilogy" of cases decided in 1986 (infra) which established judicial receptivity to summary judgment. In Garrison, supra, the Tenth Circuit said:

> We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court. Summary judgment is appropriate "if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ.P. 56(c). When applying this standard, we view the

evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party.

Although the movant must show the absence of a genuine issue of material fact, he or she need not negate the nonmovant's claim. Once the movant carries this burden, the nonmovant cannot rest upon his or her pleadings, but must bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which he or she carries the burden of proof.

The mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient to create a dispute of fact that is 'genuine'; **an issue of material fact is genuine only if the nonmovant presents facts such that a reasonable jury could find in favor of the nonmovant.** (citing Simms v. Okla. ex.rel. Dept. of Mental Health and Substance Abuse Services, 65 F.3d 1321, 1326 (10th Cir. 1999).

(Emphasis Supplied.)

REASONS FOR GRANTING THE PETITION

I. THERE IS A SPLIT IN THE CIRCUITS REGARDING THE SCRUTINY THAT EVIDENCE OF CAUSALITY SHOULD BE GIVEN IN CIVIL RIGHTS CASES IN WHICH SUMMARY JUDGMENT IS SOUGHT.

This Court should grant a Writ of Certiorari to consider the nature, kind and quantity of evidence that

must be shown by a Title VII plaintiff to survive a Motion for Summary Judgment within the evidentiary framework first described in McDonnell-Douglas v. Green, 411 U.S. 793 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), under the standard of review in summary judgment proceedings described by this court in the "Celotex Trilogy" announced in 1986. See Matsushita Electric Industrial Co. v. Zenith Radio Corp., 477 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 574 (1986); and Celotex v. Catrett, 477 U.S. 317 (1986).

Where there is no direct evidence of retaliation under 42 USC §2000e-3, a retaliation claim is analyzed under the McDonnell-Douglas burden shifting framework. Jeffries v. State of Kansas, 147 F.3d 1220, 1231 (10th Cir. 1998). The employee must first present a prima facie case by showing, 1) she engaged in protected opposition to discrimination; 2) that the employer took an adverse employment action against her; and, 3) that there is a "causal connection" between the protected activity and the adverse action. Stover v. Martinez, 382 F.3d 1064, 1073 (10th Cir. 2004). After a prima facie case has been shown, the burden shifts to the defendant to produce or "articulate" evidence of legitimate non-discriminatory justification for the action. The burden shifts back to the employee to provide evidence showing that the employer's proffered reason is a pretext for discrimination. An employee may demonstrate pretext by showing the employer's proffered reason was so inconsistent, implausible, incoherent, or contradictory that it is unworthy of belief. Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 255 n.10 (1981).

The burden-shifting framework of McDonnell-

Douglas-Burdine, announced nearly twenty years before jury trials were allowed in the 1991 Amendments to the Civil Rights Act of 1964, (42 USC §1981a(c)) was designed to ease the evidentiary burden on "employment discrimination plaintiffs who rarely...have access to direct evidence of intentional discrimination." Grigsby v. Reynolds Metals Co., 821 F.2d 590, 595 (11th Cir. 1987). The "Celotex Trilogy" cases, on the other hand, eased the burdens of movants in summary judgment proceedings and increased the burdens of nonmovants to produce evidence sufficient to convince a reasonable jury. See Celotex, supra, 477 U.S., p. 323, (a movant need not negate a nonmovant's case to achieve summary judgment); and Anderson, supra, 470 U.S. at pp. 250-251, (a nonmovant must produce evidence sufficient for a jury to return a verdict for nonmovant).

The burden-shifting framework of McDonnell-Douglas-Burdine, which is also applied to retaliation cases under Section 704 of the Act, (42 USC §2000e-3), (see Jeffries v. State of Kansas, 147 F.3d 1220, 1231 (10th Cir. 1998)), making it easier for a plaintiff to prove discrimination without direct evidence through the use of circumstantial inference, appears to be in conflict with the rules of the "Celotex Trilogy", which requires that a nonmovant bring forth all its evidence to show that a reasonable jury would find in her favor. Anderson, supra, 470 U.S. at 250-251.

This conflict in judicial policy and purpose, that is, providing a means for discrimination plaintiffs to prove by inference a prima facie case, while making it more difficult for nonmovants to overcome motion for summary judgment, seems to have resulted in some courts to self-consciously announce that it would use "added vigor," or

"special caution" or be "especially chary" in ruling on summary judgment motions. On the other hand, other courts have boldly said that, in discrimination cases, no "special caution" or other deference would be given circumstantial evidence of "intent" provided by discrimination claimants.

The split in the circuits regarding the purported "transsubstantive norm" of Rule 56 and suitability of summary judgment in employment discrimination cases is exemplified by comparing cases in the Seventh and Eighth Circuits with those in the Eleventh Circuit. Brunett, Redish and Reiter, Summary Judgment, Federal Law and Practice, Second Edition, §9.01. Most recently, the Eighth Circuit, in Wallace v. DTG Operations, Inc., No. 04-3345, 442 F.3d 1112 (8th Cir. 2006), (supra) has said that, "[S]ummary judgment should be used sparingly in the context of employment discrimination and/or retaliation case where direct evidence is often difficult or impossible to obtain", and that it would",...exercise **particular caution** when examining the factual question of intent to ensure that we dutifully extend all justifiable inferences in favor of the non-moving party. Wallace, supra. The Seventh Circuit has utilized a standard of "added vigor" in reviewing motions for summary judgment in discrimination cases. Alexander v. Wisconsin Dept. of Health, 263 F.3d 673, 681 (7th Cir. 2001). In contrast, the Eleventh Circuit, though once announcing that, "[A]s a general rule summary judgment is not a proper vehicle for resolving claims of employment on an employer's motivation and intent", Delgado v. Lockheed-Georgia Co., 815 F.2d 641, 644 (11th Cir. 1987); accord Batey v. Stone, 24 F.3d 1330, 1336 (11th Cir. 1994), now finds that such a rule has not been "recently followed" and that today no special caution should be

applied in discrimination cases. "The long and the short of it is that the summary judgment rule applies in job discrimination cases just as in other cases. No thumb is to be placed on either side of the scale." Chapman v. AI Transport, 229 F.3d 1012, 1026 (11th Cir. 2000).

The Supreme Court should grant certiorari in this matter to resolve whether, given the remedial purposes of the Civil Rights Act of 1964 and the evidentiary framework of McDonnell-Douglas v. Burdine, defendants in Title VII Civil Rights cases should bear heightened burdens of production and persuasion in summary judgment proceedings where the evidence of discrimination is necessarily indirect and inferential. It is clear that the Circuit Courts have long believed that, in discrimination cases, where intent and motive are at issue, summary judgment is disfavored; yet, at least one Circuit Court has said that defendants bear no increased burdens, and plaintiffs are given no deference, in job discrimination summary judgment proceedings.

II. SUMMARY JUDGMENT SHOULD BE GRANTED ONLY UPON THE TOTALITY OF THE CIRCUMSTANCES RATHER THAN UPON DISCRETE FACTS.

In retaliation cases, Federal Law makes it unlawful

> ...for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful practice by [Title VII] or because [the employee has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under

[Title VII].

42 U.S.C. §2000e-3(a)

This statute prohibits retaliation against an employee who has engaged in activity protected by Title VII. Unless there is direct evidence of retaliation, the burden shifting analysis set forth in McDonnell-Douglas v. Green, 411 U.S. 793, 802-804 (1973) is followed:

> Following this framework, an employee must first present a prima facie case of retaliation, which then shifts the burden to the employer to produce a legitimate non-discriminatory justification for taking the disputed employment action, the burden shifts back to the employee to provide evidence showing that the employer's proffered reason is a pretext for discrimination. Id. An employee may demonstrate pretext by showing the employer's proffered reason was so inconsistent, implausible, incoherent, or contradictory that it is unworthy of belief. Bausman v. Interstate Brands Corp., 252 F.3d 1111, 1112 (10th Cir. 2001).

Stover v. Martinez, 382 F.3d 1064, 1070 (10th Cir. 2004)

A prima facie case of Section 704 retaliation is initially made by showing, 1) protected opposition to discrimination, 2) an adverse employment action; and, 3) a causal connection existing between the protected activity and the adverse employment action. Miller v. Auto Club of New Mexico, Inc., 420 F.3d 1098, 1119-1120 (10th Cir. 2005). See also Clark County School District v. Breeden, 532 U.S. 268, 272 (2005), (saying that one must show

existence of a "causal connection" between protected activity and adverse employment action). If such is shown, the burden shifts to the defendant to "articulate" a non-discriminatory reason for its action. If such a showing is made, the plaintiff must show that the reason articulated is pretextual. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Federal courts considering summary judgment motions in civil rights retaliation cases, under the "Celotex Trilogy", have engaged in much discussion of which specific facts need to be shown by the non-moving party to demonstrate motive and intent leading to a "causal connection" between "protected activity" under Title VII and "adverse employment action." This has occurred in the context of courts endeavoring to determine whether a "reasonable jury" could find a "causal connection" between "protected activity" and "adverse action", given that this court has said that the trial court's role in ruling on a pre-trial Rule 56 Motion for Summary Judgment is the same as it is in ruling on a Motion for Judgment as a Matter of Law during trial under Rule 50(a)(1) F.R.Civ.P. Anderson v. Liberty Lobby, 477 U.S. 242, 251-252 (1986). See also Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000). Thus, in Civil Rights cases, the courts have, over time, identified certain discrete "facts" which give rise to a formulaic inference of retaliatory motive and intent justifying the denial of summary judgment. Conversely, if certain discrete identified "facts" may militate against a claim of retaliation, those discrete facts are identified by the courts as leading to an inevitable finding that "no reasonable jury" could find that discrimination took place, mandating that summary judgment be entered. This leads to what one commentator calls the "Balkanization"

of the evidence, and a discounting of the totality of the circumstances and "all of the facts", in favor of segregating certain patterns of proof that, perforce, necessitate the granting or denial of summary judgment. Spriggs, supra, §29.01.(2).

Two important themes in the quest for substantial evidentiary "proof" in summary judgment proceedings involving motive and intent in retaliation cases are "timing" and "knowledge", both of which were involved in this case. See Spriggs, Kent, Representing Plaintiffs in Title VII Cases, §7.04(7), pp. 7-91 through 7-97. One factual formulae seeks to draw an inference of discriminatory animus; while the other purports to show inference of no discriminatory animus.

In retaliation cases, it is said, "timing is everything" and the sequence of events is often pivotal. Spriggs, supra, pp. 7-91. In the Tenth Circuit a protected employment activity followed by adverse employment action "very close" to the protected activity has been deemed sufficient evidence to show motive and intent and causal connection. O'Neal v. Ferguson, 237 F.3d 1248, 1253 (10th Cir. 2001). In a summary judgment case, the Tenth Circuit found that five months between protected activity and adverse action was also sufficiently proximate to show causal connection. Wells v. Colorado Dept. of Transportation, 325 F.3d 1205 (10th Cir. 2003). But, in Candelaria v. EG&G Energy, 33 F.3d 1259, 1262 (10th Cir. 1994), the same court held that three years was not close enough to raise such an inference. Yet, in another circuit, in Brumback v. Callas Contractor, 913 F.Supp. 929, 942 (D.Md. 1995), a district court ruled that five months between knowledge of protected activity and a purported "layoff" was deemed sufficient to support an

inference of causal connection. In Clark County School District v. Breeden, supra, 532 U.S. p. 273, this court acknowledged temporal proximity as probative of motive if it is "very close", citing O'Neal, supra.

In reviewing the cases in which temporal proximity has been advanced as evidence of sufficient motive and intent to show causal connection, it is important to recognize that it is causation in the form of intangible motive and intent that must be shown, not merely extant temporal proximity. Temporal proximity, the courts have held, provides evidentiary basis from which motive and intent can be inferred. Yet, many cases have recognized that the time span between protected activity and adverse action, whether "proximal" or "distal", is not determinative, especially when there has been continuous sequence of events, sometimes referred to as "a continuous barrage of adverse action", Robinson v. Southeastern Pa Transportation Authority, Red Arrow Div., 982 F.2d 892, 895 (3rd Cir. 1993). Nevertheless, temporal proximity has been latched on to by the courts as a "fact" which would justify an inference of causal connection.

The other recurrent theme of cases which dispose of civil right retaliation claims is "knowledge". Many courts have said that showing evidence of "knowledge" of the protected activity is essential to avoid summary judgment in retaliation claims. However, again under the rubric of the "Celotex Trilogy", the courts have engaged in fact-finding determinations in order to grant or deny summary judgment. Some cases ignore evidence of institutional retaliatory intent to grant summary judgment based upon discrete evidence of "lack of knowledge" providing requisite "deniability" to avoid

liability. See e.g. Peterson v. Utah Dept. of Corrections, supra; and Luckie v. Ameritech Corp., supra. Other decisions impute "knowledge" to the institution based upon delegated authority from one with animus to one without animus, based upon a "cat's paw" theory of liability, (see Stimpson v. City of Tuscaloosa, 186 F.3d 1328, 1332 (11th Cir. 1999); Gilbrook v. City of Westminster, 177 F.3d 839, 853-855 (9th Cir. 1999). Still another line of cases has found that liability could attach in the form of "taint" where an employee would not have been subject to ultimate adverse employment action absent earlier adverse employment action motivated by unlawful animus. See Haas v. Advosys., Inc., 168 F.3d 733 (5th Cir. 1999); Dey v. Colt Construction, 28 F.3d 1446, 1459 (7th Cir. 1994); Roebuck v. Drexel University, 852 F.2d 715, 727 (3rd Cir. 1988); Simpson v. Diversitech General, Inc., 945 F.2d 156 (6th Cir. 1991); Griffin v. Washington Convention Center, 142 F.3d 1308, 1312 (D.C. Cir. 1988).

In petitioner's case, there was evidence of causal connection, in the form of both "temporal proximity' and "knowledge". Such was evidenced by the two-day Board hearing where testimony showing protected activity, adverse action one day after the no-cause letter, a protracted but continuous sequence of retaliatory action in the form of onerous "remediation plans", and evidence of pretext in the grounds for termination which were concocted to complete the "task" of terminating the petitioner. Yet, the lower courts granted and upheld summary judgment on evidence that a single player in the scenario, the Faculty Supervisor, did not know Brenda Boynton had personally spoken to the President of the College about her supervisor's hostile conduct.

III. IN PRACTICE, THE "CELOTEX TRILOGY", AS APPLIED TO CIVIL RIGHTS CASES, INFRINGES COMPLAINANTS OF THEIR RIGHT TO A JURY TRIAL.

This case presents the important and recurring problem of Summary Judgment procedure degrading the Seventh Amendment right to a jury trial, from its historic dimensions, in Title VII Civil Rights cases where determinations regarding intention and motive are particularly unsuitable for summary adjudication. Wright, Miller, and Kane, Federal Practice and Procedure, §2732.2 at 152-153 (1999). It reflects the conflicting decisions that have been reached by courts who have considered summary judgment motions in civil rights retaliation cases under the rubric of the "Celotex Trilogy" since the Civil Rights Act of 1964, as amended in 1991, permitted jury trials. (42 USC §1981a(c)) This court's decision to grant certiorari to resolve conflicting and confusing case law among the circuits concerning prima facie evidence in summary judgment proceedings, where motive and intent are at issue, will be important to thousands of people who seek redress for job discrimination in view of the substantial number of civil rights cases being decided without trial on summary judgment.[2]

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[2]See Kevin M. Clermont and Stewart J. Schwab, How Employment Discrimination Plaintiffs Fare in Federal Court, Vol. I, Journal of Empinical Legal Studies, 429-458 (2004); Martin H. Redish, Summary Judgment and the Vanishing Trial, 57 STAN. L. REV., 1329-1361 (2005).

Since the Supreme Court's "Celotex Trilogy" of cases, which eased the standards for granting summary judgment, summary judgment has increasingly been the procedure of choice for resolution of employment discrimination cases under Title VII of the Civil Rights Act of 1964. Particularly after the 1991 amendments to the Civil Rights Act of 1964 permitted jury trial in Title VII cases, summary judgment appears to be the predominant, or even preferred, method of disposition in civil rights cases. "[A]ny reader of the Federal Reporter must notice that courts routinely grant summary judgment against civil rights claims." Brunett, Redish and Reiter, Summary Judgment Federal Law and Practice, Second Edition, §9.13 (2000), p. 297. "[P]atterns have evolved in which it is clear that some courts of appeal are much more hostile to summary judgment for employers than others. Among the most hostile are the Second and Third Circuits. Among the most accepting are the Fourth, Fifth, and Tenth." Spriggs, Kent, Representing Plaintiffs in Title VII action, §29.01[1], p. 29-6. Though many courts have said that most civil rights cases are "unsuitable" for summary judgment, in cases where motive and intent are in question, such admonition is more honored in its breach than in the observance thereof.

> Purely as an empirical matter, it is clear that summary judgment is often sought and frequently granted in civil rights cases. A Federal Judicial Center Study revealed that the percentage of employment discrimination cases using summary judgment is higher than that used in cases categorized as contract, tort, or miscellaneous. The Administrative Office of the United States Court reported that in 1995, 90 percent of

> employment discrimination cases were decided without a trial. Some commentators laud this trend and others criticize it. Judge Posner describes this trend as part of a problem of increased caseload. In his terms, "[T]he expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial.

Brunett, Redish and Reiter, Summary Judgment Federal Law and Practice, Second Edition, §9.13 (2000) p. 299, quoting Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1397 (7th Cir. 1997).

A number of commentators, treatises, and federal judges have recognized the distinct trend among the federal courts to dispose of civil rights cases on summary judgment despite the unique nature of such cases where motive and intent are central issues. Judge Weinstein, warning against this trend, wrote in Gallagher v. Delaney, 139 F.3d 338, 342-343 (2nd Cir. 1998):

> A federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations. Such an effort, even were it successful, would produce questionable legal definitions for the workplace where recognition of employees' dignity might require standards higher than those of the street. . .
>
> The factual issues in this case cannot be effectively settled by a decision of an Article III judge on summary judgment. Whatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-

> economic spectrum, generally lacking the current real-life experience in interpreting subtle sexual dynamics of the workplace based on nuances, perceptions, and implicit communications....
>
> The dangers of robust use of summary judgment to clear trial dockets are particularly acute in current sex discrimination cases....
>
> In this period of rapidly changing and conflicting views of appropriate gender relationships in the workplace, decisions by a jury in debatable cases are sound in policy and consonant with the Seventh Amendment.

Judge Posner of the Seventh Circuit has also put it in clear terms:

> The expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial. The drift is understandable, given caseload pressures that in combination with the Speedy Trial Act sometimes make it difficult to find time for civil trials in the busier federal districts. But it must be resisted unless and until Rule 56 is modified (so far as the Seventh Amendment permits) to bring federal practice closer to the practice in the legal systems of Continental Europe, where there is no hard and fast line between pretrial and trial and where procedure is more summary and informal than in the United States. Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1397 (7th Cir. 1997).

CONCLUSION

For the reasons stated, the Court should grant a Writ of Certiorari.

Respectfully submitted,
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(any footnotes trail end of each document)

No. 04-8126
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRENDA BOYNTON,
Plaintiff-Appellant,

v.

WESTERN WYOMING COMMUNITY COLLEGE,
Defendant-Appellee.

November 29, 2005, Filed

NOTICE: RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: For BRENDA BOYNTON, Plaintiff-Appellant: Bernard Q. Phelan, Cheyenne, WY.

For WESTERN WYOMING COMMUNITY COLLEGE, Defendant-Appellee: Patrick E. Hacker, Cheyenne, WY.

JUDGES: Before TACHA, Chief Circuit Judge, ANDERSON and KELLY, Circuit Judges.

OPINIONBY: Stephen H. Anderson

OPINION: ORDER AND JUDGMENT *

Brenda Boynton appeals the grant of summary judgment to defendant, Western Wyoming Community College ("WWCC"), in her Title VII, 42 U.S.C. §§ 2000e through 2000e-17, action alleging that her termination from employment at WWCC was in retaliation for her complaint of sexual harassment. We affirm.

Boynton was hired by WWCC as a full-time custodian at WWCC's Rock Springs campus on December 1, 1997. n1 WWCC concedes there was no dispute that she performed satisfactorily in that position. Appellee's Br. at 3. Her supervisor was WWCC employee Gary Bussart. On August 10, 1998, Boynton was promoted to the position of Maintenance/Custodian at WWCC's Green River facility, a position involving more substantial duties and a higher rate of pay.

Following this promotion, Bussart continued to supervise Boynton. Boynton initially received satisfactory evaluations in her new job, with notations that she was learning a new position and that improvement with time was expected in certain areas, such as her productivity and her communication with others. When Boynton became pregnant, she was permitted to take maternity leave.

In September 2000, shortly before her return to work following her maternity leave, Boynton met with WWCC President Tex Boggs, alleging that Bussart had sexually harassed her more than two years earlier, when she had still been working at the Rock Springs campus. Boynton alleged that, on two occasions while she was working at the Rock Springs campus, Bussart

had inappropriately entered restrooms where Boynton was. Boynton further alleged that, after her transfer to the Green River Center, Bussart had made negative comments to her about her pregnancy and about women working, that he had asked her repeatedly when her baby was due, and that he had telephoned her at home while she was on maternity leave. She also alleged that he "disturbingly seemed to 'hover' over me and follow me around while I performed my duties." Boynton Aff. at P8, Appellant's App. at 22.

Boggs requested that the Dean of Administration, Marty Kelsey, join himself and Boynton to discuss Boynton's allegations. Kelsey was instructed to investigate the claims. He accordingly had a meeting with Boynton to gather information about her complaint and he interviewed others who might have relevant information. When interviewed by Kelsey, Bussart denied that the bathroom incidents or other incidents had occurred, and stated that he telephoned Boynton at home while she was on maternity leave to tell her that the locks had been changed on the Green River Center doors and that she would need to get new keys to get in upon her return. Boynton had told Kelsey that various other employees were aware of the incidents, but those employees told Kelsey that they were, in fact, completely unaware of such incidents. Kelsey also interviewed Mary Ann Huebner, the director of the Green River Center, inquiring whether she was "aware of any inappropriate behavior on [Bussart's] part at the Green River Center" without describing Boynton's complaint to her. Kelsey Dep., Appellant's App. at 82. Kelsey testified that he "did not go into all of these allegations" with Huebner, but rather just asked her "some general questions." Id. at

84 Huebner indicated she was unaware of any inappropriate behavior by Bussart.

After completing his investigation, Kelsey wrote to Boynton on October 9, 2000, informing her that he had found no evidence substantiating her allegations. He stated that he "would be happy to visit with you again about these matters if you can bring some concrete evidence into the conversation." Memorandum, Appellant's App. at 98. Boynton never provided any further information to Kelsey or anyone else at WWCC.

During this time, Bussart followed up on the concerns relating to communication and productivity. Bussart received complaints from other employees at the Green River Center concerning communication problems and Boynton's failure to complete tasks. On October 10, 2000, Boynton received her scheduled annual evaluation. While her overall evaluation was satisfactory, in one of five subcategories ("communication") she was rated as "marginal." Id. at 107.

In March 2001, Boynton received an evaluation ranking her performance as unsatisfactory. Bussart established a remediation plan to address these concerns. While remediation was ongoing, Boynton filed a complaint on June 25, 2001, with the Wyoming Department of Employment ("WDE") and with the Equal Employment Opportunity Commission ("EEOC"), alleging that she had been denied a more favorable work assignment and that she had been harassed and suffered discrimination because of her gender and her pregnancy, and that she had suffered retaliation because she had reported sexual harassment. This complaint was eventually

dismissed, because the WDE concluded there was no reasonable cause to believe that WWCC had discriminated against her. The EEOC adopted the WDE's findings as its own and issued a 90-day right to sue letter. Boynton did not appeal this ruling, nor did she act upon the right to sue letter.

Meanwhile, Boynton continued to receive unsatisfactory evaluations. Accordingly, following an unsatisfactory evaluation in July 2001, Bussart recommended to Boggs that Boynton be terminated. In accordance with WWCC policy, Boggs invited Boynton to meet with him to discuss the recommendation and to respond to Bussart's evaluation and recommendation. Boggs decided not to terminate Boynton. He also determined that Huebner should be Boynton's supervisor, rather than Bussart. Huebner wrote a remediation plan, dated September 13, 2001, to assist Boynton in performing her job satisfactorily.

On February 28, 2002, Boynton received an evaluation again ranking her performance as unsatisfactory. Huebner designed another remediation plan, and Boynton's performance was evaluated again on May 28, 2002. Huebner again evaluated her performance as unsatisfactory. Huebner met with Boynton, told her that her performance was not improving, and said that she had no real choice but to terminate Boynton. Boynton never mentioned discrimination or retaliation during this meeting.

Following Huebner's recommendation that Boynton be terminated, Boggs provided Boynton with a pre-termination notice listing the reasons for the proposed termination and offered to meet with her to discuss

them. During their meeting, Boynton did not raise any claim of discrimination, nor did she suggest that she thought her termination was in retaliation for her complaints about Bussart. Boggs determined that good cause existed for Boynton's termination, and he so recommended. Boynton continued to work, while Boggs' recommendation of termination was addressed by the WWCC Board of Trustees, until she was suspended with pay effective October 29, 2002.[2]

The Board hired an independent hearing officer, a retired state district court judge, who conducted a hearing, created a record, and provided advisory findings of fact and conclusions of law to the Board. Boynton was represented by counsel before the hearing officer. The Board then reviewed all the materials created by the officer and issued its final decision on February 13, 2003, in which it upheld Boynton's termination.

Boynton filed a second complaint with the EEOC, alleging an incident involving Bussart and claiming that her termination was in retaliation for her complaint about sexual harassment. The EEOC again rejected her claim and issued a right to sue letter. This action was filed on the ninetieth day after the issuance of the 90-day right to sue letter.

Boynton initially included within this action claims for discrimination and hostile work environment against Boggs and Bussart, as well as WWCC. When WWCC moved for summary judgment on all claims, Boynton essentially conceded that summary judgment in favor of Boggs and Bussart was proper, as well as summary judgment for WWCC on the discrimination claims,

leaving only her claim that WWCC terminated her in retaliation for her September 2000 allegation of sexual harassment.

The district court granted summary judgment to WWCC on Boynton's remaining claim, concluding:

there is no evidence whatsoever to permit any reasonable inference that there was any causal connection between Boynton's complaints to President Boggs in September of 200[0] and her termination, which ultimately became effective in 2003. All of the evidence suggests that Boynton's termination was for unsatisfactory performance of her job duties. She had been on three separate remediation plans and failed to meet her supervisor's expectations for improved performance. She had numerous opportunities to improve; she did not do so. It is clear that WWCC offered legitimate, nondiscriminatory justifications for its decision to terminate Boynton's employment at WWCC.

Order at 24-25, Appellant's App. at 149-50. The court further concluded that Boynton "has not carried her burden of proof that the defendant WWCC is entitled to summary judgment as a matter of law on her claim of retaliation in violation of Title VII." Id. at 152.

Boynton appeals, arguing the district court erred in granting summary judgment to WWCC because genuine issues of material fact exist regarding (1) the causal connection between her protected activity and her termination; and (2) whether WWCC's proffered reasons for her termination were pretextual.

We apply the following familiar and well-established standard of review:

We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party.

Although the movant must show the absence of a genuine issue of material fact, he or she need not negate the nonmovant's claim. Once the movant carries this burden, the nonmovant cannot rest upon his or her pleadings, but must bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which he or she carries the burden of proof. The mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient to create a dispute of fact that is "genuine"; an issue of material fact is genuine only if the nonmovant presents facts such that a reasonable jury could find in favor of the nonmovant.

Garrison v. Gambro, Inc., 428 F.3d 933, 150 Fed. Appx. 819, 2005 U.S. App. LEXIS 21765, No. 04-1409, 2005 WL 2982279, at *1 (10th Cir. Nov. 8, 2005) (quoting Fed. R. Civ. P. 56(c)) (further quotation omitted).

To establish a *prima facie* case of retaliation under Title VII, "a plaintiff must demonstrate that (1) she was engaged in protected opposition to discrimination; (2) she suffered an adverse employment action; and (3) a causal connection existed between the protected activity and the adverse employment action." *Miller v. Auto. Club of New Mexico*, 420 F.3d 1098, 1119 (10th Cir. 2005). Once the *prima facie* case is established, "the burden shifts to the employer to offer a facially legitimate rationale for the adverse action. The burden then shifts back to the plaintiff to show the employer's explanation is pretext." *Id.* at 1120.

The district court concluded that Boynton failed to establish a *prima facie* case because there was an insufficient causal connection between her complaint of discrimination and/or harassment and her termination several years later. The court also determined that Boynton failed to demonstrate that WWCC's reasons for terminating her were pretextual. We agree, for substantially the reasons set forth in the district court's order granting summary judgment.

We accordingly AFFIRM the district court's order granting summary judgment to WWCC on Boynton's Title VII claim.

ENTERED FOR THE COURT

Stephen H. Anderson

Circuit Judge

Footnotes

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

n1 An accurate recitation of the facts in this case, in particular the dates when specific incidents occurred, has been made more difficult than usual because neither party accurately and completely described the sequence of events.

n2 Boggs sent Boynton her termination letter on August 1, 2002, which Boynton appealed on August 12, 2002. On October 24, 2002, Boynton was suspended without pay by Huebner for twenty-four work hours for insubordination, refusal to follow legal instructions, and gross neglect of duty, in connection with an incident in which Boynton refused to clean up mouse droppings from Huebner's desk, despite Huebner's specific directive to do so. On October 29, she was suspended with pay, and relieved of her duties, because she was overheard making what was believed to be a threat against Huebner.

Filed 12/3/04
No. 04-CV-016-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
BRENDA BOYNTON,
Plaintiff,

v.

WESTERN WYOMING COMMUNITY COLLEGE,
Defendant.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The defendants' motion for summary judgment and the plaintiff's response in opposition to the motion, and the defendants' further reply have come before the Court for consideration, having been submitted to the Court on the parties' written submissions. The Court, having reviewed the motion and response, the materials submitted in support of the parties' respective positions, the pleadings of record, the applicable law, and being fully advised in the premises, FINDS and ORDERS as follows:

1. Summary judgment shall be granted in favor of defendants on all claims asserted against then, consistent with the representations in the parties' briefs and the representations to the Court at the final pretrial conference, conceding that the sole surviving claim in this litigation was plaintiff's claim that the 2003 termination was in retaliation for her September 2001 complaint to President Boggs. On that basis, summary

judgment will be granted in favor of defendants on all claims asserted by plaintiff in her complaint, including her retaliation claim against defendant western Wyoming Community College, which will be addressed in more detail in the following portions of this Order.

2. Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Allen v. Muskogee, Oklahoma, 119 F.3d 837, 839-840 (10th Cir. 1997). A disputed fact is material if it might affect the outcome of the suit under governing law. The dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. The factual record and reasonable inferences therefrom are construed in the light most favorable to the nonmovant. Id., quoting Anderson v. Liberty Lobby, Ind., 477 U.S. 242, 248 (1986) and Gullickson v. Southwest Airlines Pilots' Assoc., 87 F.3d 11761 1183 (10th Cir. 1996). The moving party need not affirmatively negate the nonmovant's claim in order to obtain summary judgment, but instead bears the initial burden of showing -- that is, point out to the district court -- that there is an absence of evidence to support the nonmoving party's case. Id., quoting Celotex Corp. v. Catrett, 377 U.S. 317, 325.

3. Background: Plaintiff Brenda Boynton ("Boynton") was hired by western Wyoming Community College ("WWCC ") as a full time Custodian II at the Rock Springs campus on December 1, 1997. She was promoted August 10, 1998 to the position of Maintenance/ Custodian at the Green Rivėr campus. The new position at the Green River Center involved additional duties, including building security, plowing

and sanding entrance and parking areas, and interacting with instructors and the public to set up roams for functions. Plaintiff received an increase in pay. After her reassignment, Boynton continued to be supervised by the same supervisor, Gary Bussart, who has now been dismissed from this action as a defendant. Plaintiff was initially given a satisfactory evaluation in her new position, with notations that she was learning the position and improvement with time was expected in certain areas, including productivity and communications with others.

Boynton became pregnant and was allowed to take maternity leave. After the end of her leave, she requested another week off as vacation to go hunting. Bussart denied this request.

In September 2001, Boynton net with College President Tex Boggs to assert sexual harassment complaints that she wanted to bring up before she returned to work. Her complaint related incidents that had occurred throe years earlier in 1998 while she was working as an employee on the Rock Springs campus. She complained Bussart had entered restrooms on two occasions, describing those two incidents to President Boggs. She also asserted Bussart had made negative comments about women working, that he had repeatedly asked her regarding the baby's due date, and that while she was on leave he had telephoned her at home. She also complained that he also watched her while she was performing cleaning tasks a couple of times, but did not allege he had made any sexually suggestive comments or touched her.

President Boggs requested the Dean of Administration, Marty Kelsey, to join him and Boynton to discuss Boynton's concerns. Kelsey was instructed to investigate; he had a subsequent meeting with Boynton to gather information regarding the particulars of her complaint; he interviewed anyone who might possibly have knowledge of Boynton's allegations. Bussart denied Boynton's allegations when asked about them by Kelsey, indicating that he had telephoned her at home to inform Boynton locks had been changed and she would need to get nevus keys in order to gain entrance of the building when she returned. Bussart denied the remainder of Boynton's allegations.

Boynton stated she had complained about Bussart to Rich Matthews, Bussart's supervisor. To Kelsey, Matthews denied that she had ever talked to hire about Bussart and denied the conversation Boynton said she had had with Matthews. Kelsey also talked to another employee Boynton had referenced as having information, John Montz, but Montz had no information as to what Boynton might have been talking about. Kelsey also interviewed the director of the Green River Center, Mary Ann Huebner, regarding whether there had been any kind of complaint regarding incidents in bathrooms or otherwise, without revealing the existence of Boynton's complaint to President Boggs. Huebner had never seen or heard about anything inappropriate regarding Center.

Kelsey wrote to Boynton regarding the results of his investigation and indicated the matter could not be taken any further unless she would provide additional

information. Boynton never contacted Kelsey with any further information and she did not use any of WWCC 's procedures to pursue complaints of discrimination, retaliation, or any other concern.

Because the stories of Boynton and Bussart were in conflict, the college determined that no further action could be taken without further information. After Boynton's complaint to President Boggs regarding her concerns about Bussart, WWCC determined that her supervisor should be changed and Mary Ann Huebner, the director of the Green River Center, became Boynton's immediate supervisor. Over a period of time in her employment with WWCC and under Huebner's direct supervision, Boynton was subject to several remediation plans designed to address perceived deficiencies in her work. After a period of time and a fourth unsatisfactory evaluation, on May 28, 2002 Huebner recommended that plaintiff be terminated.[1]

On this occasion, following Huebner"s recommendation that Boynton be terminated, President Boggs provided Boynton with a pre-termination notice listing the reasons for the proposed termination and offered to meet with Boynton to allow her to respond. She accepted that offer. During that meeting, Boynton did not raise any issues or complaints of discrimination or retaliation. Based upon the information and documentation that had been provided to him, upon appropriate review, Boggs determined good cause existed for termination and made a recommendation of termination Boynton appealed President Boggs' determination pursuant to existing college policy.

While the termination was pending, an incident

occurred where Boynton was instructed by Huebner to clean mouse droppings off Huebner's desk. Boynton did not do so and insisted that Huebner remove everything from her desk before she would clean it, although Huebner specifically instructed her and gave her permission to clean the desk. Huebner suspended Boynton without pay for a period of 24 hours (three 8-hour shifts) for insubordination.

Another incident occurred thereafter in which Huebner was informed that Boynton had made a comment to another employee that "bullets will fly," presumably in reference to Boynton's ongoing dispute with college administration. Boynton denied she said this and instead says that she said "words will fly." Huebner considered the comment a threat and notified the police. Boynton was suspended with pay effective October 29, 2002, pending the outcome of her hearing. She was suspended with pay and benefits from October 29, 2002 until Findings of Fact and Conclusions of Law were entered on February 13, 2003 in which the final decision to terminate Boynton's employment was made by the Board.

Boynton filed complaints regarding discrimination and retaliation allegations with the Wyoming Department of Employment and the EEOC, with the first filed June 25, 2002. All of her allegations related to issues pertaining evaluations. WWCC disputed Boynton's claims and responded. After investigating, October 10, 2002, the Wyoming Department of Employment dismissed the claim, concluding there was no reason to conclude the college had engaged in discriminatory or retaliatory acts detrimental to Boynton. The EEOC adopted the State of Wyoming's findings as its own

and issued a 90-day right to sue letter. Boynton did not file suit, and explained at her deposition she had intended the process to be some sort of a warning to the college. It is undisputed she received the right to sue letter and did not sue within the required time.

Boynton received a full due process hearing on whether good cause existed for termination and whether the decision to terminate her employment with WWCC was grounded in sex discrimination or retaliation An independent hearing officer was appointed to conduct the hearing and make recommended findings of fact and conclusions of law. The hearing, where Boynton was represented by counsel, took two days and was reported Both sides submitted proposed Findings of Fact and Conclusions of Law. After the hearing, the Board received the transcript and exhibits, the recommendations of the independent hearing officer and the proposed findings and conclusions of the parties. It also had separate legal counsel to assist them. The Board eventually entered Findings of Fact and Conclusions of Law upholding the termination. Boyntan did not appeal or seek judicial review of the administrative decision.

After Boyntan was terminated, she filed another EEOC claim alleging an incident regarding Bussart and that her termination was in retaliation for her complaint about alleged sexual harassment. The EEOC rejected the claim and issued a right to sue letter. This action was filed on the ninetieth day from issuance of the right to sue.

As noted earlier, the only remaining claim being asserted by plaintiff in this litigation is her retaliation

claim, which will now be discussed.

4. Under applicable federal law, there are three elements for a retaliation claim:

"(1) [the plaintiff] engaged in protected opposition to discrimination; (2) [the plaintiff] suffered an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action." O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1252 (10th Cir. 2001).

Peterson v. Utah Dept. of Corrections, 301 F. 3d 1182, 1188 (10th Cir. 2002).

5. The Court finds that plaintiff has not established a viable retaliation claim. The Court will assume, only for purposes of this Order, that Boynton has satisfied the first two prongs: that she engaged in protected opposition to discrimination and that she suffered an adverse employment action. In September 2001, she did bring her complaints to President Boggs regarding Bussart and the alleged sexual harassment. She was also terminated from her employment at WWCC. However, she fails entirely to satisfy the third prong and has not carried the burden of proving a causal connection between the protected activity and the adverse employment action.

As noted by the Tenth Circuit, it is crucial that Boynton's supervisor knew of her engagement in protected opposition. Id. at 1188.

An employer's action against an employee cannot be because of that employee's protected opposition unless

the employer knows the employee has engaged in protected opposition. See .Williams v. Rice, 983 F.2d 177, 181 (10th Cir. 1993) ("plaintiff must show that the individual who took adverse action against him knew of the employee's protected activity"); Gallagher v. Kleinwort Benson Gov't Sec., Inc., 698 F. Supp. 1401, 1405-07 (N.D. Ill. 1988) (complaint of unequal pay did not suggest gender discrimination). As a result, retaliation against Petersen would be prohibited by § 20OOe-3(a) only if the superior retaliating against her knew that her opposition to Tansy's treatment of Mooney was motivated by a belief that he was engaging in racial or religious discrimination.

We believe that this result is compelled not only by the natural reading of the statutory language, but also by the purpose of the provision. The purpose of § 2000e-3(a) is to let employees feel free to express condemnation of discrimination that violates Title VII. That purpose is hardly served by imposing sanctions upon employers who take action against employees who never communicate their concern about unlawful discrimination.

We can now readily dispose of Petersen's Title VII retaliation claim. To overcome the UDOC motion for summary judgment, Petersen needed to produce evidence that both (1) the UDOC took adverse employment action against her and (2) the motive for the adverse action was her opposition to Tansy's racial or religious discrimination against Mooney. She failed to meet her burden.

To begin with motive, Petersen testified that on March 7, 1997, Tansy called her a liar, announced that her

"days are numbered," and threatened to take her "out of the information loop" At that time, however, Petersen had not communicated to anyone her belief that Tansy had discriminated against Mooney on racial or religious grounds. Tansy was expressing his anger at Petersen for complaining of his treatment of Mooney, but her complaint was not, as far as he knew, protected action under Title VII. Thus, his retaliation would not violate § 2000e-3(a).

To establish a Title VII retaliation claim, Petersen would need to prove that when Tansy allegedly followed through on his threats against Petersen, he not only had this lawful retaliatory motive but was additionally motivated by his learning later that Peterson had complained of his discrimination against Mooney on religious or racial grounds. See Hawkins v. PepsiCo, Inc., 203 F.3d 274, 281 (4th Cir. 2000) (plaintiff produced no evidence to show that disparate treatment by supervisor was due to race rather than supervisor's "admittedly low regard" for plaintiff's job performance). But Petersen presented the district court with absolutely no evidence of such an additional motive. Nor is there evidence that any of Petersen's other superiors had an unlawful retaliatory motive. On the contrary, Petersen's testimony indicates that each time she asserted that Tansy had engaged in racial or religious discrimination, her superiors received the charge sympathetically. Petersen's failure to provide evidence of an improper motive for alleged retaliation would in itself require judgment against her.

Peterson v. Utah Department of Corrections, 301 F. 3d at 1188-1189. There is no evidence whatsoever that

Huebner, the decision maker recommending Boynton's termination, knew of Boynton's September 2001 complaints to President Boggs.

6. The Seventh Circuit has expressed an analysis similar to that employed in the Tenth Circuit:

An employer may not retaliate against an employee who has complained about discrimination or other practices that violate Title VII. 42 U.S.C. § 2000e- (a); Sitar v. Ind. Dept of Transp., 344 F.3d 720, 727 (7th Cir. 2000). Luckie argues that Ameritech retaliated against her by placing her on a PIP [performance improvement plan] and later terminating her employment because she contacted the EEO hotline to complain about Patterson and hired an attorney who sent letters to Ameritech alleging racial discrimination.

A plaintiff has two distinct ways of establishing a prima facie case for unlawful retaliation: the direct method and the indirect method. Stone v. City of Indianapolis Public Util. Div., 281 F. 3d 640, 644 (7th Cir. 2002). In order to survive summary judgment under the direct method, Luckie must present direct evidence that: (1) she engaged in statutorily protected activity; (2) she suffered an adverse employment action; and (3) there is a causal connection between the two. Haywood v. Lucent Tech. Inc., 323 F. 3d 524, 531 (7th Cir. 2000). Alternatively, under the indirect method, Luckie must establish that: (1) she engaged in statutorily protected activity; (2) she was performing her job according to Ameritech's legitimate expectations; (3) despite her satisfactory performance, she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated employees who did

not engage in statutorily protected activity. Williams, 361 F.3d at 1031; Stone, 281 F.3d at 644.

Luckie contends that Patterson placed her on a PIP and later fired her in retaliation for her complaints to the EEO office and for hiring an attorney who sent letters to Ameritech which complained of harassment by Patterson. Luckie's claim fails under the direct method because she cannot prove a causal connection between her complaints and her termination. The key inquiry in determining whether there is a causal connection under the direct method is whether Patterson was aware of the allegations of discrimination at the time of her decisions to place Luckie on a PIP and terminate her employment; absent such knowledge, there can be no causal link between the two. Maarouf v. Walker Mfg. Co., 210 F.3d 750, 755 (7th Cir. 2000). It is not sufficient that Patterson could or even should have known about Luckie's complaints; she must have had actual knowledge of the complaints for her decisions to be retaliatory Potter, 310 F. 3d 979, 982-83 (7th 2002), Miller, 203 F.3d at 1008 ("an employer cannot retaliate when it is unaware of any complaints"). At minimum, therefore, Luckie must offer evidence that would support a reasonable inference that Patterson was aware of Luckie's allegations of discrimination. Dey v. Colt Const. Dev. Co., 28 F.3d 1446, 1458 (7th Cir. 1994). Even in the light most favorable to her, there is simply no evidence in the record that would support such an inference. Mamie Clay has testified that she did not discuss Luckie's allegations with Patterson; in fact, she states that the two have not met or even spoken. Patterson asserts that she didn't know about Luckie's complaints at the time she made the decision to

terminate her employment. Furthermore, it is the stated policy of Ameritech's EEO department to protect the confidentiality of any employee who complains about discrimination. There is nothing in the record that refutes either Clay or Patterson's statements, nor explains why Clay would deviate from the confidentiality policy of the EEO department. Similarly, there is no evidence that Patterson knew about the letters sent in September from Luckie's attorney. The sole evidence on which Luckie relies is that Deborah Ingram of Ameritech's EEO department asked Patterson for information about the credit card balance history of her employees. Notably, the credit card inquiry was regarding all of Patterson's employees, not just Luckie. A such, Patterson would have no reason to know that Ingram's request for information was in response to a claim of discrimination by Luckie, as opposed to any of her other employees. Lacking a causal connection, Luckie's claim fails under the direct method.

Proceeding to the indirect method, the district court correctly found that Luckie failed to establish a prima facie case because she was not performing her job according to Ameritech's legitimate expectations at the time she was fired The record unambiguously reflects that Luckie had performance problems before she was placed on a PIP, and that these performance deficiencies were noted by ether managers besides Patterson. Ameritech has further shown that Luckie failed to correct these problems while on the PIP. Luckie continued to miss deadlines, the quality of her work product was unacceptable, and she was often inaccessible during work hours. Luckie's only response is that she had received positive performance

evaluations in the past. However, the fact that Luckie may have met expectations in the past is irrelevant; she must show that she was meeting expectations at the time of her termination. Peters v. Renaissance Hotel Operating Co., 307 F. 3d 535, 545 (7th Cir. 2002). By failing to establish this element of the prima facie case, Luckie's claim cannot withstand summary judgment under the indirect analysis.

Luckie v. Ameritech Corp., 2004 WL 2633287, *4-*5 (7th Cir. 2004).

7. In this case, there is no evidence whatsoever to permit any reasonable inference that there was any causal connection between Boynton's complaints to President Boggs in September of 2001 and her termination, which ultimately became effective in 2003. All of the evidence suggests that Boynton's termination was for unsatisfactory performance of her job duties. She had been on three separate remediation plans and failed to meet her supervisor's expectations for improved performance. She had numerous opportunities to improve; she did not do so. It is clear that WWCC offered legitimate, nondiscriminatory justifications for its decision to terminate Boynton's employment at WWCC.

Where the employer has provided a legitimate, non-discriminatory justification for an employment action, the burden shifts back to the employee to provide evidence shoving that the employer's proffered reason is a pretext for discrimination. Stover v. Martinet, 382 F.3d 1064, 1071. "An employee may demonstrate pretext by shoving the employer's proffered reason was so inconsistent, implausible, incoherent, or

contradictory that it is unworthy of belief." Stover v. Martinet, 382 F. 3d at 1071, citing Bausman v. Interstate Brands Corp., 252 F.3d 1111, 1120 (10th Cir. 2001). Temporal proximity between protected activity and the adverse action may, in certain instances, support an inference of causation However, in this case, the three year period between Boynton's complaints to President Boggs regarding Bussart's alleged sexual harassment and her termination, which had been recommended by her immediate supervisor, Huebner, and acted upon by the Board after a full hearing, is unquestionably insufficient to support any inference of causation. Thus, Boynton must provide other evidence of retaliatory motive if her claim is to survive summary judgment.

Boynton has provided no evidence whatsoever as to retaliatory motive other than her own speculation and belief to support her claim of retaliation. Her own subjective opinions are not sufficient. Stover v. Martinez, 382 F.3d at 1072. As in Petersen v. Utah Department of Corrections, 301 F.3d 1182, 1191 (10th Cir. 2002), this record in this case is "replete with general claims of retaliation but no specifics." Boynton offers no evidence that she was in fact complying with the employer's expectations of improved job performance pursuant to the numerous remediation plans. In fact, as her own deposition testimony demonstrates, Boynton appears to have had substantial disdain for the authority of her supervisor and demonstrated a non-compliant, defiant attitude unquestionably detrimental to her future employment prospects at WWCC.[2] It is no wonder she received poor evaluations and was eventually terminated.

8. After reviewing the parties' submissions and the applicable law, the Court finds that the plaintiff has not carried her burden of proof and that the defendant WWCC is entitled to summary judgment as a matter of law on her claim of retaliation in violation of Title VII.

Accordingly, it is therefore

ORDERED that the defendants' motion for summary judgment on all claims, including specifically plaintiff's claim of retaliation in violation of Title VII, shall be, and is, GRANTED. To the extent not specifically addressed herein, all other pending motions are DENIED AS MOOT.

Judgment shall be entered accordingly.

Dated this 3d day of December 2004.

UNITED STATES DISTRICT JUDGE

Footnotes

fn1Prior to this period, Bussart had recommended that plaintiff be terminated. This recommendation was rejected by President Boggs, who determined that Boynton had not been given sufficient information about her expected level of performance. Boggs determined that Boynton should be given additional time to do a better job and her employment with the college continued under a remediation plan designed to address the specific deficiencies in her work performance. It was in conjunction with this decision to reject the termination recommendation that Boggs

determined that, as part of a reorganization of duties in the Green River Center, Huebner, the site director, would assume direct supervision of the custodial and maintenance employees and would thus become Boynton's immediate supervisor. Bussart was removed from any supervisory authority over the Green River Center as of September 2001.

fn2 By way of example only, Boynton was advised to keep a log of her daily activities by her supervisor as part of her remediation plan. In her deposition, she admits that she kept the log on paper napkins, paper towels, or toilet paper and could not be bothered to find an alternative means of recording her activities and she "was not going to provide a notebook for them." Deposition at 157. This is in stark contrast to her deposition testimony indicating that she kept a notebook regarding her complaints, incidents and disputes with individuals at the college. In the log, for example, plaintiff notes that she is on a "pee break," recorded that between 9:09 and 9:14 she "readjusted bra strap (rt)" and between 6:12 and 6:16 pm January 16, "good healthy crap."

No. 04-8126
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRENDA BOYNTON,
Plaintiff-Appellant,

v.

WESTERN WYOMING COMMUNITY COLLEGE,
Defendant-Appellee.

1/6/06 Filed

JUDGES: Before TACHA, Chief Circuit Judge, ANDERSON and KELLY, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.